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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-391

HENRY E. COWAN, Superintendent,
Kentucky State Penitentiary
Eddyville, Kentucky .....PETITIONER

VS:

CURTIS CAUDILL .....RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Henry E. Cowan, Warden, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, Case # 74-1246.

CITATION OF OPINIONS BELOW

There are a number of cases involving the Petitioner-Appellee reported in Kentucky. The Respondent was tried by jury in the Circuit Court of Rowan County, Kentucky, and was convicted of the offense of rape of a

female under the age of twelve years and sentenced to life imprisonment on March 24, 1964.

The case in the United States District Court for the Eastern District of Kentucky was Civil Action No. 1074. A copy of the District Court's Memorandum Opinion and Order dated December 19, 1973, appears in the Appendix of this Brief.

An appeal from the United States District Court (No. 1074) to the United States Court of Appeals for the Sixth Circuit was taken and the notice of appeal was filed January 17, 1974, and the case was recorded as Civil Action No. 74-1246. A stay of execution was granted pending the appeal on January 22, 1974.

On the 9th day of July 1974 ,the United States Court of Appeals for the Sixth Circuit entered an order affirming the judgment of the United States District Court for the Eastern District of Kentucky. A copy of the Sixth Circuit's order appears in the Appendix of this brief.

The Respondent filed motions to vacate the original Rowan County Circuit Court judgment under Kentucky Rules of Criminal Procedure 11.42, but was unsuccessful in his efforts. Respondent appealed his motions to the Kentucky Court of Appeals. Some of Respondent's actions are reported in *Caudill* v. *Commwealth,* Per Curiam Opinion of Court of Appeals of Kentucky (decision rendered May 26, 1972, copy of which is filed in the Appendix), not officially reported; and *Curtis Caudill v. Henry E. Cowan, Warden,* 367 F.Supp. 905 (1973), Civil Action No. 10-1074 (12-19-1973).

JURISDICTION

Jurisdiction is invoked under United States Supreme Court Rule 19, 28 U.S.C.A.; See 2254; United States Constitutional Amendments V, VI and XIV.

QUESTIONS PRESENTED FOR REVIEW •

I. Under the facts in the instant case were the findings of the United States District Court for the Eastern District (Case No. 1074) and the United States Court of Appeals for the Sixth Circuit at Cincinnati, Ohio (No. 74-1246), in accordance with the due process of law provision, Section I of the Constitution of the United States of America?

II. Was it the constitutional duty of the trial judge, Honorable John J. Winn of the Rowan Circuit Court in Kentucky, when sentencing the Respondent to infor the Respondent of (1) his right to appeal, and (2) his right to appointed counsel for appeal, purposes when no effective Kentucky statute, rule of precedure or court decision required that the Respondent be so informed? (Note: Kentucky Rule 11.02 (1) and (2), entitled XI Judgment: Execution, did not become effective until January 1, 1967.)

III. Are existing subsequently enacted (viz: after March 1964) state and federal statutes, adopted rules of court procedure (viz: Rule 11.02, Kentucky Rules of Criminal Procedure effective date January 1, 1967), and/or any court decisions requiring that each convicted defendant be informed of (1) his right to appeal and (2) his right to appointed counsel at his sentencing (before

January 1, 1967) now retroactively effective in Kentucky back through March 1964?

The following Section XI. Judgment: Execution, in the Kentucky Rules of Criminal Procedure provides:

> "Rule 11.02. Sentence. (1) Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant and his counsel an opportunity to make a statement or statements in the defendant's behalf and, if the sentence is fixed by the court, to present any information in mitigation of punishment.
>
> (2) After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal, or unable to employ counsel, to apply for leave to appeal in forma pauperis and to have the continued assistance of counsel to perfect and prosecute the appeal. If the defendant so requests, the clerk shall prepare and file forthwhile a notice of appeal in his behalf. (Amendment to RCr 11.02 effective January 1, 1967)."

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved in material part are as follows:

The United States Constitution, Amendments V, VI, and XIV; USCA 2254.

The due process of law constitutional provision applies equally to both parties in this action. One applicable Constitutional provision involved, in material part, is as follows:

"AMENDMENT XIV, Sec. 1 . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

Initially the Respondent Caudill had raised four questions in his habeas corpus proceeding. Judge Hermansdorfer, of the Eastern District Court of Kentucky, held the Respondent, by refusing appointed counsel on three occasions and then insisting on trying the case himself, waived his right to appointed trial counsel. The Judge further held that federal habeas corpus relief was not a substitute for appeal. (See *Caudill v. Cowan*, 367 F.Supp. 905 [1-2] (1973).)

The district court further held that the questions as to the correctness of the jury instructions and insufficiency of the evidence presented were not cognizable in an action for federal habeas corpus relief. (See *Caudill v. Cowan*, supra.)

The basis of the court's action in the instant case is, was the Respondent's fourth and last contention, which was "that he was not informed (at the time of sentencing) of his right of appeal and as a result thereof he was denied his right of appeal and his right to proceed in forma pauperis." The Respondent, in an evidentiary hearing, swore that he first became aware of his right of appeal only after his incarceration at the penitentiary notwithstanding the fact that he had previously been convicted and served sentences on other felony charges.

The trial judge, Honorable John J. Winn, now deceased, was aged, senile, infirm, unable to recollect, and

was never able to testify after this habeas corpus action was filed. The court reporter was retired, was unable to locate her short-hand notes of the trial which were taken more than eight years back, and was uncertain about exactly what happened at sentencing.

The Commonwealth's Attorney on the date of trial was Elijah M. Hogge, now a state official in the Department of Motor Transportation. He advised counsel for Petitioner by letter date dDecember 12, 1973, that the trial judge used great diligence "in this case" and it was his "belief that the defendant was advised by the court of his right to appeal, his right to counsel for appeal and his right to appeal in forma pauperis." However, the court record was silent on the foregoing matter. Hogge, in the closing paragraph of his letter, stated, "I would not be in position to make a sworn statement to this effect. I regret that I cannot be more helpful in this instance."

The Respondent, due to the silent record, the passage of time, death and retirement, was aided in his efforts to obtain a favorable writ of habeas corpus order in that there was not now available direct, positive contradictory evidence, even from bystanders, that the petitioner was informed by the court of his right to appeal. The court held that the testimony of the repeatedly convicted felon Curtis Caudill was sufficient to meet the burden of proof on that point.(See *Caudill v. Cowan*, 367 F.Supp. 905, 907 [4, 5] (1973).)

However, the Petitioner appealed and he contended at the outset and still contends that the ruling of the courts below are erroneous since Rule 11.02(2) of the

Kentucky Rules of Criminal Procedure, as amended, only came into being as of January 1, 1967. The Petitioner believes he, too, is entitled to due process of law and equality before the law. Petitioner contends the retroactive effect of the courts' rulings below are wrong. (See *Pasley v. Dr. Winfred Overhalser*, 282 F.2d 494 [1, 2, 3] (1960).)

In the instant case the Respondent's complaint came some ten years after his conviction. In previous cases the courts have held in cases in which the subject was far more worthy of belief than in the instant case that the burden of proof becomes greater as does the presumption of regularity with the passing of the years.

In the United States Court of Appeals for the District of Columbia, in the case of *Bishop v. United States*, 223 F.2d 582 (1954), discussed the theory, factors, and testimony to be considered in the burden to be borne by the petitioner attacking his conviction after a substantial lapse of time. The court said "and this burden is magnified when the attack does not come until fifteen years after the event."

While it is not the primary question presented herein, and all factors and the record considered in the instant case, the Petitioner does not agree that the Respondent bore the requisite burden of proof. See *Douglas* v. *California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *United States ex rel Smith* v. *McMann*, 417 F.2d 648 (2nd Cir. 1969, dissent of J. Friendly, p. 657) cert. denied, 397 U.S. 925, 90 S.Ct. 929, 25 L.Ed.2d 105; *Goodwin* v. *Cardwell*, 432 F.2d 521 (6th Cir. 1970, dissent of J. O'Sullivan,

p. 529); *United States ex rel Singleton* v. *Woods,* 440 F.2d 835 (7th Cir. 1971).

While it is not the primary question presented herein, and all factors and the record considered in the instant case, the Petitioner does not agree that the Respondent bore the requisite burden of proof. See *Douglas* v. *California,* supra; *United States ex rel Smith* v. *McMann,* supra, *Goodwin* v. *Cardwell, supra; United States ex rel Singleton* v. *Woods,* supra.

In 1969, the United States Court of Appeals for the 4th District held that the doctrine and mandate applied in *Douglas v. California,* supra, also applied in *Nelson v. Peyton,* 415 F.2d 1154, 1158 (4th Cir. 1969). However, since *United States ex rel Smith v. McMann,* supra, in the case of *Nelson v. Peyton,* the 4th Circuit has held *Nelson not to be retroactive.* See *Shiflett v. Virginia,* 447 F.2d 50, 55, 56, 57 (4th Cir. 1971).

The three questions presented herein should be determined in the light of due process of law and the existing law as to retroactivity. The questions presented turn and rest primarily upon the law of retroactivity.

RETROACTIVITY, THE THREE-PRONG TEST

The Supreme Court has long been faced with the problem of retroactivity when espousing a new judicial rule. In *Stovall v. Denno,* 87 S. Ct. 1967, 388 U.S. 293, 18 L. Ed.2d 1199 (1967), the Supreme Court set out the three-prong test. The three considerations are (a) the purpose to be served by the new standards ; (b) the extent of

tiie reliance by law enforcement authorities on the old standards, and (c) *the effect on the administration of justice of a retroactive application of the new standards.*

In its latest decision applying this test, *Gosa v. Mayden,* 93 S.Ct. 2926, 413 U.S. 665, 37 L.Ed.2d 873 (1973), the court refused to apply *O'Callahan v. Parker,* 89 S.Ct. 1683, 395 U.S. 258, 23 L.Ed.2d 291 (1969), retroactively. *O'Callahan,* supra, held that a serviceman may not be tried by court marshal for a nonservice-connected crime in peace time. Gosa was convicted of rape while off duty and off base, prior to *O'Callahan.* In refusing to apply O'Callahan retroactively, the Court stated under the three-prong test that "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist v. U.S.,* 394 U.S. 244, 249, 22 L.Ed.2d 248, 89 S.Ct. 1030 (1969). In his opinion for the plurality in *Williams v.U.S.,* 401 U.S. at 653, 28 L.Ed.2d 388, Mr. Justice White emphasized that where "the major purpose of new constitutional doctrine is overcome" a trial aspect "that substantially impairs its truth-finding function," the new rule is given complete retroactive effect. However, the Court went on to conclude that "the fact that a new rule tends incidentally to improve or enhance reliability does not in itself mandate the rule's retroactive application . . .

Thus, retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of the several purposes in formulating the new standard was to prevent distortion in the process."

The Court found that, *nothing in O'Callahan indicates that the major purpose of that decision was to remedy a defect in the truth-determining process.* The purpose was to guarantee Fifth and Sixth Amendment rights to jury indictment and trial. Thus, the purpose behind *O'Callahan did not mandate* retroactivity.

In *Caudill,* we also find that the main purpose of the decision Caudill seeks to apply retroactively was *not* to enhance or remedy the *truth determining process* but to enforce the broad rights of appeal and counsel on appeal. Likewise, therefore, the cases *do not mandate retroactivity.*

The second prong of the test, reliance by law enforcement authority on old law does not enter into the situation in *Caudill.*

This leaves the third prong, effect of retroactivity on the administration of justice.

The Court, in *Gosa,* supra, cited *DeStefano v. Woods,* 392 U.S. 634, 20 L.Ed.2d 1308, as holding " ' the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant because the denial of jury trial has occurred in a very great number of cases.' The very same factor is present with likelike significance here, for the military courts have been functioning since 1916 . . ."

Likewise, in *Caudill* we are dealing with literally thousands of convicted prisoners, former convicts, and repeater felons, now released, who under the decision herein attacked will be granted the right to file belated appeal. The sheer number will stagger the entire state

judicial system. This will be multiplied by the usual difficulties encountered when dealing with appeals of old convictions dating back decades.

The same standards espoused in *Gosa* are set out and developed in the attached list of cases (Appendix E) in which the Supreme Court has refused to apply retroactively decisions dealing with new principles of judicial process.

CONCLUSION

Petitioner submits that his petition for a writ of certiorari should be granted for the reason set forth herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Guy C. Shearer, one of counsed for respondent, hereby certify that the foregoing brief was served on petitioner by depositing three copies of same in the United States Mail, first class postage prepaid, on October 12 1974, addressed to counsel for petitioner-appellee, Honorable Anthony M. Wilhoit public defender, 625 Leawood Drive, Frankfort, Kentucky 40601, Honorable Curtis Caudill, Kentucky State Penitentiary, Post Office Box 128, Eddyville, Kentucky 41129.

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